

FCC MAIL SECTION

Federal Communications Commission

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Implementation of Section 302 of  
the Telecommunications Act of 1996

Open Video Systems

CS Docket No. 96-46

#### FOURTH REPORT AND ORDER

Adopted: April 10, 1997

Released: April 15, 1997

By the Commission:

#### I. INTRODUCTION

1. On February 8, 1996, the Telecommunications Act of 1996<sup>1</sup> added Section 653 to the Communications Act of 1934, establishing open video systems as a new framework for entry into the video programming marketplace.<sup>2</sup> Subsequently, the Commission adopted a series of orders prescribing rules and policies governing the establishment and operation of open video systems.<sup>3</sup> The Commission has 10 calendar days from receipt of a complete FCC Form 1275 to issue an order approving or disapproving the certification.<sup>4</sup> Upon receipt of a complete FCC Form 1275, the Commission will publish a notice of the filing in the Daily Digest and post the filing on the Commission's Internet site.<sup>5</sup> Comments or oppositions to the certification must be received by the Office of the Secretary within five days of the applicant's filing and must be

<sup>1</sup>Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

<sup>2</sup>Communications Act of 1934, as amended, § 653, 47 U.S.C. § 573 ("Communications Act").

<sup>3</sup>See In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems, CS Docket No. 96-46, FCC 96-312, Second Report and Order and First Order on Reconsideration (released July 23, 1996) ("Second Report and Order") at ¶ 34; In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Third Report and Order and Second Order on Reconsideration, CS Docket No. 96-46, FCC 96-334, (released August 8, 1996) ("Third Report and Order") at ¶ 29.

<sup>4</sup>See Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1); see also 47 C.F.R. § 76.1502(e).

<sup>5</sup>Notice of the filing of certification applications is posted on the FCC's Internet site at <http://www.fcc.gov/Bureaus/Cable>.

served upon the applicant.<sup>6</sup> The FCC Form 1275 will be deemed approved if the Commission does not disapprove the filing within the 10 calendar day time period.<sup>7</sup> If the Commission disapproves the FCC Form 1275, the applicant may file a revised FCC Form 1275 or refile its original submission with a statement addressing the issues in dispute as stated in our order disapproving the filing.<sup>8</sup>

2. Based on the experiences of recent open video system certification proceedings, we believe that certain modifications to the open video system procedures will benefit both the parties and the Commission. The intent of this *Fourth Report and Order* is to revise our procedures for both the filing of certification applications and the filing of comments and oppositions to provide the most efficient processing of applications for certification, given the limited 10-day statutory deadline for deciding certification applications.

3. Section 553 of the Administrative Procedures Act ("APA") provides that an agency must provide notice of proposed rules in the Federal Register and afford an opportunity for interested persons to present their views.<sup>9</sup> However, rules of "agency organization, procedure, or practice" are exempted from the APA's notice and comment requirement.<sup>10</sup> We find that the changes in the Commission's open video system procedures proposed in this *Fourth Report and Order* fit within this exception because they are purely ministerial and do not alter the rights of interested parties.<sup>11</sup> The purpose of these changes is to organize the Commission's internal procedures to provide for a more efficient processing of applications for certification. Accordingly, we issue this *Fourth Report and Order* without providing for a prior notice and comment period.

## II. CERTIFICATION APPLICATION

4. To date, certain certification applications that were submitted were found to be improperly filed with the Commission because the accompanying diskettes were not properly

<sup>6</sup> See 47 C.F.R. § 76.1502(e). Currently, intermediate holidays are not counted in determining the response period for comments or oppositions. 47 C.F.R. § 1.4(g) ("Unless otherwise provided...if the filing period is less than 7 days, intermediate holidays shall not be counted in determining the filing date.")

<sup>7</sup> See 47 C.F.R. § 76.1502(e).

<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. § 553(b), (c).

<sup>10</sup> 5 U.S.C. § 553(c).

<sup>11</sup> For example, with respect to the proposed change in the calculation of time, parties are still given the opportunity to present their viewpoints to the agency, only the time limit for accepting these viewpoints has changed. See *Lamoille Valley R. Co. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983) and *JEM Broadcasting Co. Inc. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994).

formatted. Parties are reminded that all certification applications must be filed on 3.5 diskettes formatted in an IBM compatible form using Wordperfect 5.1 for Windows and Excel 4.0 software.<sup>12</sup> Attachments are part of the application package and, therefore, are subject to the same diskette requirements as the application, unless technologically infeasible.<sup>13</sup> In addition, we remind parties that a hard copy and a diskette copy of the FCC Form 1275 and all attachments, must be filed with both the Office of the Secretary and the Bureau Chief, Cable Services Bureau.<sup>14</sup> In order to ensure the prompt delivery of the application and related pleadings to the staff person responsible for its review, parties are required to attach a cover sheet to the filing and related pleadings indicating that the submission is either an open video system certification application or related pleadings. Specifically, for an open video system certification application, the only wording on this cover sheet shall be "Open Video System Certification Application" and "Attention: Cable Services Bureau." Similarly, for pleadings related to an open video system application, the only wording on this cover sheet shall be "Open Video System Certification Application Comments" and "Attention: Cable Services Bureau." In either case, the wording shall be located in the center of the page and should be in letters at least 1/2 inch in size.<sup>15</sup> For the purpose of open video system certification applications and related pleadings, we are also modifying our mailing address. Parties shall include the words "open video systems" on their mailing envelopes.<sup>16</sup>

### III. FILING COMMENTS OR OPPOSITIONS

5. In several instances, comments or oppositions filed with the Office of the Secretary were not also filed with, or served on, the Cable Services Bureau. Due to the short review period for certification applications, we now require parties wishing to respond to an FCC Form 1275 filing to submit comments or oppositions simultaneously to the Office of the Secretary and the Bureau Chief, Cable Services Bureau.<sup>17</sup> Comments will not be considered timely filed unless filed with both offices.<sup>18</sup> Untimely filed comments will not be deemed properly filed, and will

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<sup>12</sup> See *Second Report and Order* 25, n.104.

<sup>13</sup> Any attachments or other materials not easily stored on computer disk may be filed in hard copy only. Due to the rapidly changing computer technology, the Cable Services Bureau may at any time modify the format and/or diskette required for a certification filing. Any such modifications will be announced by the Cable Services Bureau in a Public Notice.

<sup>14</sup> See Instructions for FCC Form 1275 at 1.

<sup>15</sup> See Appendix B for an example. The example is typed in Wordperfect 5.1, Times Roman Bold Font, 48 point size.

<sup>16</sup> Parties using express mail services, such as Federal Express, shall write the words "open video systems" in the comment box of the mailing envelope.

<sup>17</sup> Mail for both offices should be sent to 1919 M Street, N.W., Washington, D.C. 20554.

<sup>18</sup> Copies of comments and oppositions will be available in the Cable Services Bureau Public Reference Room, Room 333, 2033 M Street, NW, Washington, D.C. 20554.

not be considered by the Commission.

#### IV. CALCULATION OF RESPONSE PERIOD

6. Under the current rule, comments or oppositions must be filed within five days of the applicant's filing.<sup>19</sup> The Commission has 10 calendar days from receipt of a complete FCC Form 1275 to issue an order approving or disapproving the certification. Intermediate holidays are not counted in determining the commenters' five-day response period, but are counted in determining the Commission's review period.<sup>20</sup> These two rules, taken together, could lead to a situation where the Commission's order could be due on the same day that comments are due, effectively denying the Commission an opportunity to review the comments in rendering its decision.<sup>21</sup>

7. Accordingly, in this *Fourth Report and Order* we now modify this rule to provide that comments or oppositions must be received by the Office of the Secretary and the Bureau Chief, Cable Services Bureau within five calendar days of the applicant's filing and served upon the applicant.<sup>22</sup> Intermediate holidays<sup>23</sup> (e.g. Saturday, Sunday, and other officially recognized federal holidays) will be counted in determining the due date for filing comments and oppositions.<sup>24</sup> If, after making the necessary calculations, the due date for filing comments falls on a holiday, comments shall be filed on the next business day before noon, unless the nearest business day precedes the fifth calendar day following a filing, in which case the comments will

<sup>19</sup> See 47 C.F.R. § 76.1502(e).

<sup>20</sup> See 47 C.F.R. § 76.1502 and 47 C.F.R. § 1.4

<sup>21</sup> For example, in *Urban Communications Transport Corporation* the Commission received the application on Friday, December 20, 1996. See *Urban Communications Transport Corporation*, DA 96-2203, (Cab. Serv. Bur. Rel. December 30, 1996). Due to the intervening holidays of Saturday, December 21; Sunday, December 22; Wednesday, December 25; Saturday, December 28; and Sunday, December 29 comments were not due until December 30, 1996. However, because the Commission had 10 calendar days to review the application, the Commission's order was also due on December 30, 1996.

<sup>22</sup> All comments and oppositions must be tendered for filing before 5:30 p.m. in the Office of the Secretary and the Bureau Chief, Cable Services Bureau.

<sup>23</sup> 47 C.F.R. § 1.4(e)(1) defines the term "holiday" as Saturday, Sunday, officially recognized federal legal holidays, and any other day on which the Commission's offices are closed and not reopened prior to 5:30 p.m.

<sup>24</sup> 47 C.F.R. § 1.4(g). Under the new methodology approved in this order, if the Commission received a certification application on Friday, November 22, comments would be due on Wednesday, November 27, because intermediate holidays such as Saturdays and Sundays would be counted in determining the comment period.

be due on the preceding business day.<sup>25</sup> We note that this modification of our computation of time regulations applies solely to the open video system certification process.

## V. CERTIFICATION DENIALS

8. If the Commission denies certification to an applicant, the applicant may file a revised FCC Form 1275 or refile its original submission with a statement addressing the issues in dispute as stated in our order disapproving the filing.<sup>26</sup> Applicants to operate an open video system must serve such refilings on any objecting party from the previous proceeding and on all local communities in which the applicant intends to operate.<sup>27</sup> The Commission will consider any revised or refiled FCC Form 1275 to be a new proceeding. Commenters from the original proceeding must refile their original comments if they think such comments should be considered in the subsequent proceeding. All persons, however, remain free to file new comments in response to a refiled FCC Form 1275.

## VI. CHANNEL ALLOCATION AND CARRIAGE DISPUTE RESOLUTION PROCEEDINGS

9. In order to commence the channel allocation process, an operator is required to file a Notice of Intent with the Commission. The Commission then releases the Notice of Intent to the public. As part of that release, the Cable Services Bureau is required to publish the Notice on the Internet. In order to ensure the prompt delivery of such notices to the staff persons responsible for their review, we now require parties to include the word "open video systems" on their mailing envelopes.<sup>28</sup> Parties are also now required to attach a cover sheet to the filing indicating that the submission is an Open Video System Notice of Intent. Specifically, for a Notice of Intent, the only wording on this cover sheet shall be "Open Video System Notice of

<sup>25</sup>For example, if the fifth day falls on a Saturday then the filing would be due on that preceding Friday. However, if the fifth day falls on a Sunday, then the filing will be due on the next day, Monday, before noon (or Tuesday, before noon, if the Monday is a holiday).

We note that the Commission's general rules regarding computation of time provide that if after making the necessary calculations, the due date for filing comments falls on a holiday, comments shall be filed on the next business day. 47 C.F.R. § 1.4(j). Our modification of this general computation of time rule only applies to Open Video System Certification Application Proceedings and does not apply to other Commission proceedings. In the case of Open Video System Certification Application Proceedings, we are modifying the general rule to allow Commission staff as much time as possible, given the short statutory review period, to review the complete record and make a determination.

<sup>26</sup> See *Second Report and Order* ¶ 35.

<sup>27</sup> *Id.*

<sup>28</sup> Parties using express mail services, such as Federal Express, shall write the words "open video systems" in the comment box of the mailing envelope.

Intent" and "Attention: Cable Services Bureau." This wording shall be located in the center of the page and should be in letters at least 1/2 inch in size. Parties shall include the words "open video systems" on their mailing envelopes. Parties shall submit the Notice of Intent and related pleadings simultaneously to the Office of the Secretary and the Bureau Chief, Cable Services Bureau.

10. Additionally, pursuant to Section 653(a)(2) of the 1996 Telecommunications Act, the Commission has the authority to resolve disputes regarding channel carriage.<sup>29</sup> In order to conform our procedures for the filing of such complaints with our procedures for other open video system matters, parties are now required to include the words "open video systems" on their mailing envelopes.<sup>30</sup> Parties are also now required to submit the complaint and materials related to these proceedings simultaneously to the Office of the Secretary and the Bureau Chief, Cable Services Bureau. Such pleadings must include a cover sheet indicating that the submission is either an Open Video System Channel Carriage Complaint or related pleading. In either case, the only wording on this cover sheet shall be "Open Video System Channel Carriage Dispute Resolution" and "Attention: Cable Services Bureau." This wording shall be located in the center of the page and should be in letters at least 1/2 inch in size.<sup>31</sup>

## VI. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

11. The requirements adopted in this *Fourth Report and Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "PRA") and found to impose modified information collection requirements on the public. Implementation of any modified requirement will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the PRA. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to comment on the information collections contained in this *Fourth Report and Order* as required by the PRA. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and, (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

12. Written comments must be submitted by the Office of Management and Budget on the proposed and/or modified information collections on or before 60 days after the

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<sup>29</sup>Telecommunications Act of 1996, Section 653(a)(2), 47 U.S.C. § 573(a)(2).

<sup>30</sup>Parties using express mail services, such as Federal Express, shall write the words "open video systems" in the comment box of the mailing envelope.

<sup>31</sup>See Appendix B for an example. The example is typed in Wordperfect 5.1, Times Roman Bold Font, 48 point size.

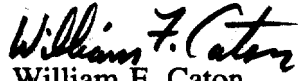
publication of the *Fourth Report and Order* in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to [dconway@fcc.gov](mailto:dconway@fcc.gov). For additional information concerning the information collections contained herein contact Dorothy Conway at 202-418-0217, or via the Internet at [dconway@fcc.gov](mailto:dconway@fcc.gov).

## VII. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), 4(j), 303(r), and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 573 of the rules, requirements and policies discussed in this order ARE ADOPTED and Section 76.1502(e) of the Commission's rules, 47 C.F.R. § 76.1502 IS AMENDED as set forth below.

14. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than 60 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

**APPENDIX A****Rule Changes**

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 1.4 is amended by revising paragraphs (g), (j), and (k) to read as follows:

(g) Unless otherwise provided (e.g., §§ 1.773 and 76.1502(e)(1) of the Rules), if the filing period is less than 7 days, intermediate holidays shall not be counted in determining the filing date.

(j) Unless otherwise provided (e.g. § 76.1502(e) of the Rules) if, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day. *See* § 1.4(e)(1) of this section.

(k) Where specific provisions of part 1 conflict with this section, those specific provisions of part 1 are controlling. *See, e.g.,* §§ 1.45(d), 1.773(a)(3) and 1.773(b)(2). Additionally, where Section 76.1502(e) conflicts with this section, those specific provisions of Section 76.1502 are controlling. *See e.g.* 47 C.F.R. § 76.1502(e)

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 76--CABLE TELEVISION SERVICE**

1. Section 76.1502 is amended by revising paragraph (d), (e), and (f) to read as follows:

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(d) Parties are required to attach a cover sheet to the filing indicating that the submission is an open video system certification application. The only wording on this cover sheet shall be "Open Video System Certification Application" and "Attention: Cable Services Bureau." This wording shall be located in the center of the page and should be in letters at least 1/2 inch in size. Parties shall also include the words "open video systems" on their mailing envelope.

(e)(1) Comments or oppositions to a certification must be filed within five calendar days of the Commission's receipt of the certification and must be served on the party that filed the certification. If, after making the necessary calculations, the due date for filing comments falls on a holiday, comments shall be filed on the next business day before noon, unless the nearest business day precedes the fifth calendar day following a filing, in which case the comments will be due on the preceding business day. For example, if the fifth day falls on a Saturday, then the filing would be due on that preceding Friday. However, if the fifth day falls on Sunday, then the filing will be due on the next day, Monday, before noon (or Tuesday, before noon if the Monday is a holiday).



(2) Parties wishing to respond to a FCC Form 1275 filing must submit comments or oppositions with the Office of the Secretary and the Bureau Chief, Cable Services Bureau. Comments will not be considered properly filed unless filed with both of these Offices. Parties are required to attach a cover sheet to the filing indicating that the submission is a pleading related to an open video system application, the only wording on this cover sheet shall be "Open Video System Certification Application Comments." This wording shall be located in the center of the page and should be in letters at least 1/2 inch in size. Parties shall also include the words "open video systems" on their mailing envelopes.

(f) If the Commission does not disapprove the certification application within ten days after receipt of an applicant's request, the certification application will be deemed approved. If disapproved, the applicant may file a revised certification or refile its original submission with a statement addressing the issues in dispute. Such refilings must be served on any objecting party or parties and on all local communities in which the applicant intends to operate. The Commission will consider any revised or refiled FCC Form 1275 to be a new proceeding and any party who filed comments regarding the original FCC Form 1275 will have to refile their original comments if they think such comments should be considered in the subsequent proceeding.

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2. Section 76.1503(b)(1), the first sentence and the second sentence through the word "information," is revised to read as follows:

Notification. An open video system operator shall file with the Secretary of the Federal Communications Commission a "Notice of Intent" to establish an open video system, which the Commission will release in a Public Notice. Parties are required to attach a cover sheet to the filing indicating that the submission is an Open Video System Notice of Intent. The only wording on this cover sheet shall be "Open Video System Notice of Intent" and "Attention: Cable Services Bureau." This wording shall be located in the center of the page and should be in letters at least 1/2 inch in size. Parties shall also include the words "open video systems" on their mailing envelopes. Parties must submit copies of the Notice of Intent with the Office of the Secretary and the Bureau Chief, Cable Services Bureau. The Notice of Intent shall include the following information:

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3. Section 76.1513(d) is revised to add the following:

(8) Parties are required to submit the complaint and materials related to these proceedings simultaneously to the Office of the Secretary and the Bureau Chief, Cable Services Bureau.

(9) Pleadings must include a cover sheet indicating that the submission is either an Open Video System Channel Carriage Complaint or related pleading. In either case, the only wording on this cover sheet shall be "Open Video System Channel Carriage Dispute Resolution" and "Attention: Cable Services Bureau." This wording shall be located in the

center of the page and should be in letters at least 1/2 in size. Parties shall also include the words "open video systems" on their mailing envelopes.

Appendix B

**OPEN VIDEO  
SYSTEM  
CERTIFICATION  
APPLICATION**

**ATTENTION:  
CABLE SERVICES  
BUREAU**